



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
JUDICIAL REVIEW NO. 7 OF 2013

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR-ADMINISTRATION, MASENO UNIVERSITY.....1ST RESPONDENT

MASENO UNIVERSITY.....2ND RESPONDENT

DOROTHY OLUM.....EX-PARTE

J U D G M E N T

The notice of motion by the applicant dated 27-3-2013 seeks the following reliefs:

That this honourable court do issue an order of certiorari to quash the decision of the 1st and 2nd respondents to dismiss the applicant Dorothy Olum summarily as communicated by the 1st respondent letter dater 27-11-2012.

That the honourable court do issue an order of prohibition to stop the 1st and 2nd respondents from surcharging the ex-parte applicant for the alleged loss of goods.

The cost of the application.

The statements of facts and the verifying affidavit of the applicant sworn on 12-3-2013 supports the application. Briefly, the applicant was employed by the respondent as stores clerk on 22-9-1992. sometimes in 20-7-2012 she was suspended on allegation that she had engaged herself on fraudulent activities which had costed the respondent a loss of Kshs. 2,275,536/=. There appears to have been two sets of disciplinary process against the applicant which led to her dismissal.

It is this dismissal therefore that prompted the applicant to seek the above orders. Her contention is that she was not accorded a fair hearing and even when an hearing was conducted she was never granted sufficient time to prepare herself. She further argued that she was never supplied with the copies of proceedings nor reasons for her conviction. All in all she argues that the rules of natural justice namely fair hearing was flouted by the respondent.

On its part the respondent through the affidavit of Mathew Ouma Onyango sworn on 2-5-2013 has argued otherwise. They argued that indeed disciplinary process was undertaken against the applicant and was accorded an opportunity to appeal to the vice chancellor but she failed. It is also contended that this matter ought to be heard by the Industrial court as the issues raised by the applicant are well governed by

the Employment Act 2007.

Having perused the proceedings herein the substantive issue to determine as a matter of priority is whether this matter is governed by private or public law regime. There is no doubt that the applicant was an employee of the respondent. The annexures to the applicant's application shows several correspondences as well as charges leveled against the applicant. The disciplinary action taken by the respondent was within its mandate. Though no proceedings were attached it appears that the same was undertaken on two occasions, namely 22-8-2012 and 1-11-2012.

From the attachments to the affidavit I can easily conclude that what was the issue at hand was an employee/employer relationship. The same was governed by the terms of services as well as Maseno University Act 2000. I find that this was a private law issue. The contract of services stipulated their relationship.

Presumably, where the applicant was dissatisfied then she was to appeal to the vice chancellor. She obviously participated in the proceedings and whether she was ready or not there is no evidence that she protested.

As earlier indicated I do not find that this application is properly before this court. I agree with the respondent assertion that the proper place to adjudicate is the Industrial Court. The relationship between the parties herein is governed by the employment contract. The same is governed by private law.

In the case of **Disciplinary Committee of Maseno University & 2 Others -VS- Professor Ochong & 2 others [2012] eKLR** the Court of Appeal in setting aside the high court decision relied upon by the applicant herein had this to say:

“The above opinion by the trial Judge is an emotive statement which opens a window for lecturers whose services are statutory underpinned to obtain orders of judicial review having the effect similar to an order of injunction or specific performance of their contract of employment.

However, orders of judicial review are orders used by the court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case the contract of employment between the respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose from the performance of the respondents contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties”.

The coincidence herein is strange. However, I would not hesitate that the court of appeal above decision binds this court. The issue between the applicant and the respondent is a private law affair and not public one. The best avenue is the Industrial Court.

Consequently, I disallow this application with cost to the respondent.

Dated, signed and delivered at Kisumu this 23rd day of July, 2014.

H.K. CHEMITEI

JUDGE